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State of New York Public Employment Relations Board Decisions from November 8, 1978

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from November 8, 1978

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:
UNIFORMED FIRE FIGHTERS ASSOCIATION, MOUNT VERNON, NEW YORK, LOCAL 107, IAFF,	:
Respondent,	:
-and-	:
CITY OF MOUNT VERNON,	:
Charging Party.	:

BOARD DECISION AND
ORDER

Case No. U-2989

In the Matter of	:
CITY OF MOUNT VERNON,	:
Respondent,	:
-and-	:
UNIFORMED FIRE FIGHTERS ASSOCIATION, MOUNT VERNON, NEW YORK, LOCAL 107, IAFF,	:
Charging Party.	:

Case No. U-3078

In the Matter of	:
UNIFORMED FIRE FIGHTERS ASSOCIATION, MOUNT VERNON, NEW YORK, LOCAL 107, IAFF,	:
Respondent,	:
-and-	:
CITY OF MOUNT VERNON,	:
Charging Party.	:

Case No. U-3106

For Local 107, IAFF

THOMAS P. FLYNN, Vice President

For the City of Mount Vernon

RAINS, POGREBIN and SCHER
(TERENCE M. O'NEIL, ESQ., (of Counsel))

This matter involves three charges. The first (Case No. U-2989), brought by the City of Mount Vernon, alleges that Uniformed Fire Fighters Association, Mount Vernon, New York, Local 107, IAFF, refused to negotiate in good faith for a contract to succeed one that was expiring on December 31, 1977. The hearing officer determined that, after participating in three desultory negotiating sessions in which it declined to provide a sufficient explanation of its demands or to explain its rejection of the City's response, Local 107 prematurely declared the existence of an impasse on October 20, 1977. This, he concluded, was a violation of Local 107's duty to negotiate in good faith. Local 107 has filed exceptions to this conclusion.

Case No. U-3078 was instituted by the charge of Local 107 that, after the impasse was declared on October 20, 1977, the City refused the assistance of a PERB mediator appointed to help the parties reach agreement, even though its fiscal year was to end seventy days later with the end of the calendar year. The hearing officer found merit in the charge despite his conclusion that Local 107 had not negotiated in good faith before requesting mediation. He determined that the parties were at impasse by operation of §209.1 of the Taylor Law, which provides that "...an impasse may be deemed to exist if the parties fail to achieve agreement at least one hundred twenty days prior to the end of the fiscal year of the public employer."

The third case (U-3106) involves a different negotiation between the parties. On July 27, 1977, the City recognized Local 107 as the representative of a separate unit consisting of Deputy Chiefs. In the negotiations that followed, Local 107 presented demands for a two-year contract covering Deputy Chiefs that would be retroactive to January 1, 1976. When the City refused

to negotiate for benefits which would be retroactive to a period prior to the date of the recognition, Local 107 insisted upon its demand by bringing the matter to arbitration under §209.4 of the Taylor Law. The hearing officer determined that the City was obligated to negotiate for benefits that would be retroactive to the beginning of the fiscal year in which Local 107 was recognized, that is, to January 1, 1977, but that it was under no duty to negotiate for the 1976 calendar year. Both parties have filed exceptions to this part of the hearing officer's decision. The City argues that the hearing officer erred in ruling that it was under a duty to negotiate benefits covering any period prior to the July 27, 1977 recognition date. Local 107 contends that the hearing officer should have found that Local 107 had been the exclusive representative of the Deputy Chiefs since August 23, 1967, on which date it was originally recognized as the representative of all members of the Fire Department, including Deputy Chiefs.

DISCUSSION

The record supports the hearing officer's conclusion that Local 107's conduct during the three negotiating sessions preceding its declaration of impasse did not satisfy its obligation to negotiate in good faith. That obligation requires a party to "approach the negotiating table with a sincere desire to reach an agreement."¹ Local 107's conduct evidenced a lack of such intention, as indicated by its unwillingness to explain its demands or to listen to the City's justifications for its counterproposals.

¹ Southampton PBA, 2 PERB ¶3011, at page 3274 (1969).

We agree with the hearing officer's conclusion of law that the City was obligated to accept the assistance of the mediator appointed by PERB, notwithstanding Local 107's prior refusal to negotiate in good faith. The City asserts that it had no obligation to participate in mediation. This would have been a correct position had the dispute been in the private sector, as Section 203(c) of the Taft-Hartley Law states explicitly:

"The failure or refusal of either party to agree to any procedure suggested by the Director [of Mediation] shall not be deemed a violation of any duty or obligation imposed by this Act."

We believe that the absence of a parallel provision from the Taylor Law reflects a contrary legislative intent with respect to the scope of the duty to negotiate imposed by that Law.² The Taylor Law was drafted on the basis of a report and recommendations of the Governor's Committee on Public Employee Relations (dated March 31, 1966). That Committee wrote (at p. 33 of its report):

"Collective negotiations in government employment need to be closely coordinated with the calendar of the legislative and budget year. Indeed, an impasse is typically identified by the failure to have achieved an understanding or agreement before the approach of budgeting deadlines established by law... An impasse may be defined in terms of the failure to achieve agreement sixty days, or some longer period, prior to the budget submission date established by law for the agency or unit of government."
(emphasis supplied)

This recommendation is reflected in §209.1 of the Taylor Law, which provides that "an impasse may be deemed to exist if the parties fail to achieve agreement at least 120 days prior to the end of the fiscal year of the public

² We recognize that some other states that have imposed mediation have explicitly provided that it is unlawful to refuse to participate in mediation (see California Public Educational Employer-Employee Relations Act §3543.5, 51 GERR 1418). The language of the Taylor Law and its legislative history persuade us that such provision, while useful for purposes of clarification, is not required in New York as a basis for PERB's authority to find an improper practice.

employer."³ Once PERB concludes that an impasse exists, §209.3 requires it to appoint a mediator "to assist the parties to effect a voluntary resolution of the dispute...." The refusal of the City to cooperate with PERB's efforts to effect a voluntary settlement impeded those efforts and constituted a refusal to negotiate in good faith.

The use of the word "may" in §209.1 implies that this Board is not obliged to conclude that a true impasse exists simply by reason of the advent of the 120-day period. There are occasions when further direct dealings between the parties could bring about agreement without mediation. The determination whether this is so in a particular case is the function of this Board's Director of Conciliation. Because he cannot investigate each situation personally, his practice is to assign a mediator, who is also given an investigative responsibility. He is instructed to investigate and report to the Director of Conciliation whether mediation would be useful or appropriate at that stage of the dispute. The City's failure to cooperate with the mediator obstructed his preliminary investigation and hampered the negotiation process.

With respect to the Deputy Chiefs, we find no merit in Local 107's assertion that it has been the exclusive representative of the Deputy Chiefs since August 23, 1967 by reason of having been recognized on that date.⁴ We determine that the hearing officer erred in concluding that the City was under an obligation to negotiate with Local 107 about benefits for Deputy

³ Originally §209.1 of the Taylor Law provided that "an impasse may be deemed to exist if the parties fail to achieve agreement at least sixty days prior to the budget submission date of the public employer." This proved unworkable because some public employers did not have a precise budget submission date and it was changed to the present language by L.1971, c.503.

⁴ Local 107 may have been recognized at an earlier time to represent Deputy Chiefs in the same unit as rank-and-file firefighters. If it were so recognized, it had long since abandoned its right to represent Deputy Chiefs. On February 15, 1977, Local 107 filed a representation petition to include Deputy Chiefs in its rank-and-file unit. That petition was withdrawn on July 13, 1977, when the City and Local 107 agreed that the Local would be recognized to represent the Deputy Chiefs, but in a separate unit. On July 27, 1977, the City Council recognized Local 107 in accordance with the agreement.

Chiefs that would be retroactive to any period before July 27, 1977, the date when it was formally recognized as the representative of the unit of Deputy Chiefs. Section 208.1(a) of the Taylor Law extends to a recognized or certified employee organization the right to engage in collective negotiations on behalf of the employees in its negotiating unit. The reasonable meaning of this right is that it is acquired as a grant of authority to seek changes in terms and conditions of employment existing at the time of recognition or certification.⁵ It is thus a prospective grant directed to the establishment of a collective bargaining relationship between the public employer and the employee organization to be governed by their mutual obligations to deal with each other as to the determination of prospective terms and conditions of employment. The Taylor Law reflects the prospective nature of the mutual obligations assumed by the parties by declaring that, to the extent possible, public employers should be able to anticipate their future expenses when they adopt their budgets. We have already noted the concern of the Taylor Committee that collective negotiations ought to be complete before the public employer is required to adopt a budget out of which the negotiated benefits will be paid. To require changes in terms and conditions of employment retroactively to a time before the duty to negotiate arose through recognition or certification would be inconsistent with the concept of collective bargaining and with the policy of the Law. It could upset the stability of terms and conditions of employment of Deputy Chiefs which were both established and applicable during a time when Local 107 had no right to represent them.

⁵ The decision of the National Labor Relations Board in Tendico, Inc., 232 NLRB No. 118 (1977), is of some interest. There was disagreement among the members of the Board as to whether an employer that improperly refused to recognize a union should be compelled to recognize it and bargain with it as of the day when it improperly refused to recognize the union, or as of some later date following the decision of the administrative law judge. This disagreement would have no point if an employer which had not improperly refused to recognize a union were obligated to negotiate with the union over benefits covering a time before the union became the representative of the employees in the bargaining unit.

We perceive, as well, another basis for our holding. The nature of collective negotiations is that the parties engage in the give-and-take of an exchange of considerations as a means of achieving agreement. Where, however, a benefit sought focuses upon a period when one of the contracting parties had no statutory standing to achieve it, the demand is not of a give-and-take nature, but rather one which would divest benefits already accrued and which were earned for services already performed.

It follows that the City is not under a duty to negotiate with Local 107 for benefits to be provided to Deputy Chiefs for services that were already performed before July 27, 1977, when Local 107 became the representative of the Deputy Chiefs.

Within the constraints we have outlined, retroactivity of benefits is, as the hearing officer wrote, a mandatory subject of negotiation. Accordingly, the City is obliged to negotiate with Local 107 for benefits for Deputy Chiefs that would be retroactive from the date of the agreement to July 27, 1977. The City has been prepared to do this, but it properly resisted negotiating for benefits that would be retroactive to a time when Local 107 did not represent the Deputy Chiefs.

NOW, THEREFORE, WE ORDER that Local 107 forthwith negotiate in good faith on behalf of the City's firefighters, and that it withdraw its demand for retroactivity of benefits for Deputy Chiefs effective prior to July 27, 1977; and

WE FURTHER ORDER that the City of Mount Vernon participate

in mediation, as required by the
Director of Conciliation.

DATED: New York, New York
November 9, 1978

Harold R. Newman

Harold R. Newman, Chairman

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:
	:
SCHENECTADY CITY SCHOOL DISTRICT,	:
BOARD OF EDUCATION,	:
	:
- and -	:
Respondent,	: <u>BOARD DECISION AND ORDER</u>
	:
SCHENECTADY FEDERATION OF TEACHERS,	: <u>CASE NO. U-2819</u>
LOCAL 803, AFT, AFL-CIO,	:
	:
Charging Party.	:
	:
	:

THEALAN ASSOCIATES, INC. (JOSEPH T. KELLY), for
Respondent

FRED DAY, (Field Representative, NYSUT), for Charging
Party

This matter comes to us on the exceptions of the Schenectady City School District (District) to a hearing officer's decision that it had violated its duty to negotiate in good faith with the Schenectady Federation of Teachers, Local 803, AFT, AFL-CIO (Union). The hearing officer determined that the District failed to inform the Union that it objected to the continuation of increments until after the parties had reached an impasse in their negotiations. The District's exceptions contend that the hearing officer erred in this determination. It argues that it had made clear to the Union at an early stage of negotiations that it sought a one-year freeze of all benefits, including increments.

FACTS

Negotiations between the Union and District commenced in January 1977 for a contract to succeed one expiring on August 31 of that year. The parties'

proposals were directed to the language and substance of the existing contract, Article 5 of which dealt with compensation generally, and §5.1.2 of which dealt with salary increments. The District's posture was that all benefits should be frozen but its proposals did not refer specifically to §5.1.2 of the existing contract. The hearing officer was persuaded by the Union that it did not understand that the proposed freeze applied to increments until the District explicitly stated that it did on June 24, 1977.¹ This occurred long after March 2, 1977, when an impasse in the negotiations dispute was declared.

The hearing officer concluded that the failure of the District to make specific reference to §5.1.2 of the existing contract in its demands misled the Union through the entire course of the negotiations that preceded fact-finding. On this conclusion, he decided that the District failed to meet its statutory obligation to negotiate in good faith.

DISCUSSION

In its exceptions, the District argues that the hearing officer viewed the evidence too narrowly in that he allowed himself to be persuaded by the absence of a specific reference to §5.1.2 in its negotiating demands. It contends that its demand for a one-year freeze of all benefits was sufficiently clear to communicate to the Union that it was objecting to further salary increments. Although there is testimonial evidence in the record to support the hearing officer's conclusion that the language of the demands misled the Union, we are persuaded that as a whole the record indicates that it was not in fact misled. In particular, we are persuaded by Paragraphs 6 and 7 of the

¹ The District's proposal did not prevent negotiations on the subject of a salary increment. The parties' agreement, which was reached on September 3, 1977, provided for increments.

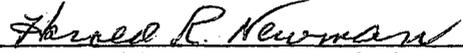
Union's charge which read as follows:

- "6. On or about mid-February 1977, approximately four to six weeks subsequent to the initial exchange of packages, the District informed the Union that its exonomix [sic] package did not include increment, and that the District's position was to freeze ALL economic items, thereby pulling back from its original offer. (Emphasis in original)
7. The District has, since mid-February 1977, not deviated from its position that all economic items be frozen."

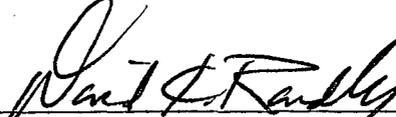
This language compels the conclusion that the Union understood the posture of the District at an early stage of negotiations as one covering increments as well as all other economic items.

NOW, THEREFORE, WE ORDER that the charge herein be dismissed.

DATED: New York, New York
November 8, 1978


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2C - 11/8/78

In the Matter of

GREAT NECK UNION FREE SCHOOL DISTRICT,

Respondent,

-and-

GREAT NECK TEACHERS ASSOCIATION, LOCAL
2686, NYSUT, AFT, AFL-CIO,

Charging Party.

BOARD DECISION AND ORDER

CASE NO. U-3227

ERIC RHODES, for Respondent

HOWARD EDELMAN, for Charging Party

This matter comes to us on the exceptions of the Great Neck Teachers Association, Local 2686, NYSUT, AFT, AFL-CIO, charging party herein, to a hearing officer's decision dismissing its charge that the Great Neck Union Free School District violated its duty to negotiate in good faith by unilaterally lowering the salary rate for teachers of "in-service" courses. The School District conceded that it lowered the salary rate for the teaching of in-service courses, as alleged in the charge, but it defended its actions on the ground that it was under no obligation to negotiate the salary rate for such teaching with the charging party.

The agreement between the School District and charging party contains a description of the negotiating unit as including "all professional personnel employed in the Great Neck Schools" (emphasis supplied). The description then enumerates fifteen job classifications which are included in the unit.

The enumeration does not list teachers of in-service courses.¹

Article 21 of the agreement establishes an "In-Service Institute" which is directed by an In-Service Education Advisory Committee. The nature of the In-Service Institute and the duties of the Committee are specified in detail. The details specified establish that the parties were concerned with the impact of the Institute on the quality of classroom teaching and upon salary advancements for classroom teachers. The only reference to the cost of the In-Service Institute is that the School District "will allocate at least the sum of \$12,000 annually for in-service courses other than those that are mandated."

Most, but not all, of the teachers of in-service courses hold regular teaching positions with the School District. Approximately ten percent of the instructors, however, do not. Appendix F to the parties' agreement contains a

1. The description of the negotiating unit is set forth in Appendix A to the contract between the parties. In its entirety, it states:

"For the purpose of this Agreement and as a description of the negotiating unit, The Great Neck Teachers Association is recognized as the negotiating agent for all professional personnel employed in the Great Neck schools, except per diem substitutes and those holding administrative positions or Adult Education positions. Members of the unit include those performing in the following job classifications:

1. Classroom teachers (including special area teachers)
2. Coordinators of Audio-Visual services
3. Guidance counselors
4. Heads of Department
5. Librarians and/or Library Media Specialists
6. Nurse-teachers
7. School Psychologists
8. School Social Workers
9. Long Term Substitutes
10. Summer School Teachers
11. Teachers of the Homebound (HB)
12. Teachers of Special Individualized Reading (S.I.R.)
13. Teachers of English as a Second Language (T.E.S.L.)
15. [sic] Externally Funded Teaching Personnel"

comprehensive extra compensation schedule which specifies the extra compensation to be paid for fifty-nine coaching assignments and forty-nine other activities performed by teachers. It contains no reference to the compensation of teachers of in-service courses.

Prior to 1971, teachers of in-service courses were compensated at the rate of sixty dollars for each two-hour session. In that year, the In-Service Education Advisory Committee recommended that the salary be increased to eighty dollars. Without any objection or comment from the charging party, the School District unilaterally set the rate at sixty-nine dollars for each two-hour session. In 1972, the Committee recommended an increase to seventy dollars. Again without consultation with the charging party, the School District accepted this recommendation.

The hearing officer evaluated these facts and concluded that both the language of the parties' agreement and past practice establish that teaching in the In-Service Institute is not unit work. This conclusion is challenged by charging party. It argues that the reference to "all professional personnel" in the contractual description of the negotiating unit and the contractual establishment of the In-Service Education Advisory Committee compels reversal of the hearing officer's decision. We conclude that the totality of the evidence supports the hearing officer's decision.

NOW, THEREFORE, WE ORDER that the charge herein be dismissed.

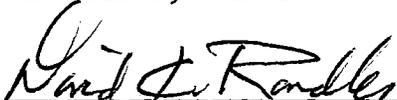
DATED: New York, New York
November 9, 1978



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

5449

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2D - 11/8/78
	:	
VILLAGE OF POTSDAM,	:	
	:	
Employer,	:	
	:	
-and-	:	<u>BOARD DECISION AND ORDER</u>
	:	
NEW YORK STATE PROFESSIONAL FIRE FIGHTERS,	:	
IAFF, AFL-CIO,	:	<u>CASE NO. C-1567</u>
	:	
Petitioner,	:	
	:	
-and-	:	
	:	
POTSDAM EMPLOYEES ASSOCIATION, CIVIL	:	
SERVICE EMPLOYEES ASSOCIATION, INC.,	:	
	:	
Intervenor.	:	
	:	

RICHARD H. WYSSLING, ESQ., Value Management
Consultants, Inc., for Employer
ROBERT F. GOLLNICK, for Petitioner

This matter comes to us on the exceptions of the New York State Professional Fire Fighters, IAFF, AFL-CIO (IAFF), to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition for certification as the exclusive negotiating representative of fire drivers employed by the Village of Potsdam. The Director dismissed the petition on the basis of his determination that the fire drivers did not constitute an appropriate negotiating unit.

Facts

The Village of Potsdam does not employ professional firefighters. It has a volunteer fire department of approximately 50 members. It also employs four persons in the Civil Service classification of "fire driver". At present, the four fire drivers are in a negotiating unit consisting of both white-collar and blue-collar employees. Their primary job responsibilities

are driving and attending to their vehicles. These are reasonably comparable to the responsibilities of the Village's heavy and light equipment operators. Both are in the same negotiating unit, and they receive comparable wages. Aside from wages, their benefits are similar to those of other employees in the unit. The only other negotiating unit of employees of the Village of Potsdam consists of policemen.

The Director indicates that he would have granted the petition had the fire drivers been firefighters, but he determined that they were not. He also determined that fire drivers have a sufficient community of interest with the other unit employees to continue in the existing negotiating unit, given the employer's concern that an increase in the number of negotiating units would impair its ability to serve the public.

In its exceptions, IAFF points to responsibilities of fire drivers that are normally performed by firefighters. Fire drivers respond to fire alarms and they operate the motorized equipment of the fire companies. They may raise fire ladders, but only if the raising of the ladders can be accomplished by use of the truck's mechanism. They also lay hoses, but only from the hydrant to the truck, and not from the truck to a burning building.

IAFF contends that the similarity of benefits received by fire drivers to those of other unit employees is not an indication of a community of interest. On the contrary, it argues, this similarity evidences a conflict of interest in that the legitimate concerns and interests of the fire drivers have been sacrificed by the current majority representative which has directed its efforts to the service of the white and blue-collar employees who constitute the bulk of its unit.

Discussion

We affirm the decision of the Director.

Although the evidence establishes that fire drivers perform some

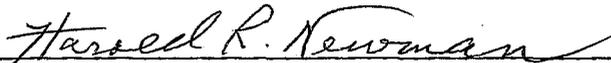
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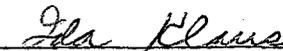
duties that are normally performed by firefighters, they are not duties which justify separate units for firefighters. The unique factors in firefighting that justify separate unit placement relate to the danger to which firefighters are exposed while fighting fires. The fire drivers employed by the Village of Potsdam do not ¹ fight fires and are not exposed to such dangers.

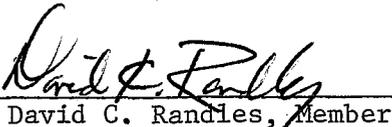
We also affirm the Director's conclusion that there is no evidence that the current unit representative has failed to represent the fire drivers fairly in negotiations or that it has overlooked their bargaining concerns. On the contrary, the record establishes that the fire drivers have not invoked the assistance of the current unit representative with respect to matters that are of particular concern to them.

NOW, THEREFORE, WE ORDER that the petition herein be, and it hereby is, dismissed.

DATED: New York, New York
November 8, 1978


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

¹ The evidence is inconclusive, but the fire drivers may have occasionally extinguished automobile and leaf fires before the volunteer firefighters arrived. Assuming arguendo, that they have, those fires are not normally of the dangerous character which makes firefighting a unique occupation.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2E - 11/8/78
	:	
THE YONKERS PUBLIC LIBRARY	:	<u>BOARD DECISION AND ORDER</u>
	:	
Upon the Application for Designation of	:	<u>CASE NO. E-0444</u>
Persons as Managerial or Confidential.	:	
	:	

KENNETH J. FINGER, P.C., for the Association
DR. PHILIP HARRIS, for the Library

This matter comes to us on the exceptions of the Yonkers Public Library Staff Association (Association) to a decision of the Acting Director of Public Employment Practices and Representation (Director) that Adelaide Wenz, Anna Butkowski and Ruth Hession are confidential employees of the Yonkers Public Library (Library).¹

Facts

The Library, one of the largest in the State, has five branches, an annual budget of approximately \$1.8 million, and a staff of approximately one hundred full-time and fifty part-time employees. The Director of the Library is Jacqueline Miller. She is its chief executive officer and reports only to the Board of Trustees. She is responsible for formulating policy and making recommendations to the Trustees. She participates in collective negotiations on behalf of the Library. Her associate in representing the Library in collective negotiations is Irene Rogers, the Assistant Director of the Library. Ms. Rogers compiles data for the Library's bargaining proposals, represents the Library in the Third and Fourth steps of the contractual grievance procedure, and has a significant responsibility for personnel administration. Neither Miller nor Rogers has ever been formally designated as a managerial employee, but it is clear that their job responsibilities satisfy the definition

¹ Section 201.7 states, in pertinent part: "Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees...."

5453

of managerial employees contained in the Taylor Law.²

The Association is the duly recognized representative of the employees of the Library. Wenz, Butkowski and Hession have been in the negotiating unit represented by the Association and they wish to continue to be represented by the Association.

Wenz is Miller's personal secretary. She types all of Miller's memoranda and correspondence, including matters related to collective negotiations. Work related to such negotiations involves only five percent of her time, but the nature of her duties makes her privy to confidential labor relations matters.

Butkowski serves as Rogers' secretary. She, too, works on materials that are related to collective negotiations, although the amount of time she spends on such work is even less than the time so spent by Wenz.

Hession is the chief fiscal analyst of the Library. She reports directly to Miller. She makes personnel and budget projections. She also determines the cost of salary and benefit proposals made during collective negotiations and analyzes their impact upon the Library. Hession attends both open and Executive meetings of the Board of Trustees at which the status of collective negotiations is discussed.

In its exceptions, the Association argues that the amount of time spent by Wenz and Butkowski on matters related to collective negotiations is de minimis and, therefore, not sufficient basis for them to be designated confidential employees. It further argues that Butkowski could not be a confi-

² A managerial employee is one "... (i) who formulate[s] policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment." (Section 201.7[a])

dential employee within the meaning of the statute because she works for Rogers, and Rogers has never been formally designated as a managerial employee. With respect to Hession, it argues that the "costing out" of negotiations proposals is merely technical work which does not expose her to confidential information. It further argues that she has no actual function at the Executive meetings of the Board of Trustees and, therefore, her attendance at those meetings cannot be a basis for designating her as a confidential employee. It claims some support for this proposition in a determination of the Director that was never brought to this Board in New York City Board of Education, 9 PERB ¶4020 (1976). There the Director determined that an employee who sometimes sat in on grievance committee meetings did not become confidential for that reason because--as the employer in that case conceded--his presence at those meetings was not necessary.

The Association contends that the Director erred in distinguishing Butkowski from several other clerical employees who worked in the same room as she did because they all had access to files that were related to negotiations.

DISCUSSION

We affirm the decision of the Director. While it is true that neither Wenz nor Butkowski spent much time on materials related to collective negotiations, this is because the Library generated only a small amount of clerical work of this type. Such clerical work of this type as it does generate is nevertheless confidential. It has to be done by some clerical employees and this responsibility falls upon Wenz and Butkowski. The fact that other clerical employees have access to files containing information related to collective negotiations does not detract from the confidential nature of the positions of Wenz and Butkowski.

Hession, too, is a confidential employee. Unlike the New York City Board of Education case where the employer did not require the employee's attendance at confidential meetings, here, the Library requires Hession's attendance at such meetings. We do not reach any conclusion as to the value to the Library of her attendance at Executive sessions of the Board of Trustees at which the status of collective negotiations is discussed. It is sufficient that we find no basis in the record for a conclusion that her attendance has been required merely for the purpose of depriving her of a right to be represented by the Association.

In a Library which employs approximately one hundred full-time and fifty part-time employees, we find that the three employees here may be reasonably required to assist the two managerial employees and to act in a confidential capacity to them in connection with the preparation for and conduct of collective negotiations.

ACCORDINGLY, WE ORDER that Adelaide Wenz, Anna Butkowski and Ruth Hession be designated confidential employees.

DATED: New York, New York
November 8, 1978

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2F - 11/8/78
	:	
TOWN OF LAKE LUZERNE,	:	
	:	
Respondent,	:	<u>BOARD DECISION AND ORDER</u>
	:	
-and-	:	<u>CASE NOS. U-2987</u>
	:	
ROBERT A. ARMSTRONG,	:	<u>U-2994</u>
	:	
Charging Party.	:	

WILLIAM A. BACAS, ESQ., for Respondent
PETER B. O'CONNELL, ESQ., for Charging Party

This matter comes to us on the exceptions of Robert A. Armstrong to a hearing officer's decision dismissing his charge that the Superintendent of Highways of the Town of Lake Luzerne first threatened him and then discharged him because of his involvement in union organizational activities. Armstrong contests the hearing officer's conclusion that he was discharged for political and personal reasons which were not related to his efforts to establish a union in the Highway Department of the Town. He also complains that the hearing officer erred in disregarding evidence that establishes that at the time he was discharged he was attempting to organize his fellow employees in order to seek additional vacation pay. Finally, he argues that, even if the reason for his discharge was the Highway Superintendent's disapproval of his political activities, that discharge constituted an improper practice because those political activities were protected by the Taylor Law. He argues that the Taylor Law protects the right of public employees to support the political rivals of their employers where they believe that by doing so they can improve their terms and conditions of employment.

We affirm the decision of the hearing officer. There may be some circumstantial evidence supporting Armstrong's allegation that the purpose of the Highway Superintendent in discharging him may have been to frustrate the organization of Highway Department employees. Among other things, the Highway Superintendent first tried to persuade the hearing officer that he discharged Armstrong because of Armstrong's misconduct in connection with the ordering of tools. Armstrong argues that the Superintendent attempted to explain his discharge on the basis of his political activities only when it became clear that the hearing officer was not persuaded by the original explanation. According to Armstrong, the pretextual character of the first explanation indicates that the second explanation, too, was a pretext, the real reason being his attempt to organize employees.¹

The hearing officer was persuaded by testimonial evidence that the Superintendent was indifferent to whether or not Highway Department employees organized a union. In part, this conclusion was reached on the basis of the hearing officer's assessment of the credibility of the various witnesses. Having reviewed the record carefully, we do not find sufficient reason to reverse the hearing officer's conclusion.

It follows from his conclusion that the Superintendent did not intend to frustrate the organization of a union of Highway Department employees that the hearing officer committed no prejudicial error by not commenting upon evidence that may have established that, prior to his discharge, Armstrong was attempting to organize his fellow employees in order to seek additional vacation

¹ We do not find it surprising that the Superintendent was reluctant to explain the discharge on the basis of Armstrong's political activities. Such a discharge may raise questions under the First and Fourteenth Amendments of the U.S. Constitution, even though it would not raise any question under the Taylor Law, Elrod v. Burns, 427 US 347 (1976).

pay. Such activities, if any, do not, in and of themselves, establish an improper practice.²

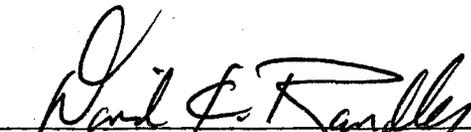
The argument that the Taylor Law protects political activities, as such, of public employees is rejected.³ The political right of public employees to support one candidate or another raises questions under the First and Fourteenth Amendments of the U.S. Constitution,⁴ but it is not in and of itself an inherent aspect of the right of public employees to organize or to be represented by employee organizations.

NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED, New York, New York
November 9, 1978


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

² Section 209-a.1 of the Taylor Law provides, in pertinent part:

"...It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights;... (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization;" (emphasis supplied)

³ See Laurence and VanPelt, 1 PERB ¶1399.91 (1968).

⁴ Elrod v. Burns, supra.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2G - 11/8/78

In the Matter of :
: STATE OF NEW YORK (UNIFIED COURT SYSTEM), :
: Employer, : BOARD DECISION AND ORDER
: -and- :
: COURT OFFICERS BENEVOLENT ASSOCIATION OF : CASE NO. C-1668
: NASSAU COUNTY, :
: Petitioner, :
: -and- :
: NASSAU CHAPTER, CIVIL SERVICE EMPLOYEES :
: ASSOCIATION, :
: Intervenor. :

In the Matter of :
: STATE OF NEW YORK (UNIFIED COURT SYSTEM), :
: Employer, :
: -and- :
: SUFFOLK COUNTY COURT EMPLOYEES ASSOCIATION, : CASE NO. C-1672
: LOCAL 716, SEIU, AFL-CIO, :
: Petitioner, :
: -and- :
: CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., :
: Intervenor. :

HOWARD A. RUBENSTEIN, ESQ., for the Employer
DONOVAN & DONOVAN, ESQS., for Petitioner, Court
Officers Benevolent Association of Nassau County
ISRAELSON, MANNING & RAAB, ESQS., (PERRY S. HEIDECKER,
ESQ., of Counsel) for Petitioner, Suffolk County
Court Employees Association, Local 716, SEIU, AFL-CIO
ROEMER & FEATHERSTONHAUGH, ESQS. (STEPHEN WILEY, ESQ.,
of Counsel) for Intervenors

This is a decision in two consolidated cases, both of which present a single question: on the special facts here present, what is the appropriate month during which a rival employee organization may file a petition to replace an incumbent employee organization as representative of employees in the Unified Court System? The answer to that question depends upon whether the status of the incumbent organization is related to the fiscal year of the State of New York or to that of the counties that are serviced by the courts for which the non-judicial employees work.

Facts

For years, responsibility for court employees had been split between the Administrative Board of the Judicial Conference, a State agency, and the counties serviced by the courts. The counties had a substantial responsibility for funding the operations of the courts, including the salaries of non-judicial court employees, which was considered sufficient for it to be deemed the employer of those employees for Taylor Law purposes. Often, pursuant to the parties' agreement, these employees were in negotiating units which included other county employees. All of this was changed by Chapter 966 of the Laws of 1976, which transferred financial responsibility for the courts from the counties to the State and declared the State to be the employer of all court employees, effective as of April 1, 1977 (Judicial Law §220.6).

Case No. C-1668 involves a challenge to the status of the Nassau Chapter of the Civil Service Employees Association (CSEA) as representative of non-judicial employees of courts that had been funded by Nassau County. CSEA and Nassau County are parties to a collectively negotiated agreement covering non-judicial court employees which runs from January 1, 1977 through December 31, 1978, the end of the county's fiscal year. The challenging petition was filed by the Court Officers Benevolent Association of Nassau County on May 4, 1978.

Case No. C-1672 involves a challenge to the status of the Civil Service Employees Association (CSEA) as representative of non-judicial employees of courts that had been funded by Suffolk County. CSEA and Suffolk County are also parties to a collectively negotiated agreement covering non-judicial employees which runs from January 1, 1977 through December 31, 1978, the end of the county's fiscal year. The challenging petition was filed by the Suffolk County Court Employees Association, Local 716, SEIU, AFL-CIO, on May 31, 1978. The fiscal year of the State of New York runs from April 1 of one calendar year through March 31 of the following calendar year.

The petitions were timely if the relevant fiscal year is that of the counties, but not if it is that of the State. Section 208.2 of the Taylor Law provides that a recognized or certified employee organization:

"...shall be entitled to unchallenged representation status until seven months prior to the expiration of a written agreement between the public employer and said employee organization determining terms and conditions of employment. For the purposes of this subdivision, (a) any such agreement for a term covering other than the fiscal year of the public employer shall be deemed to expire with the fiscal year ending immediately prior to the termination date of such agreement,...."

The Rules of this Board (§201.3) permit a petition to be filed during the month preceding the expiration of the period of unchallenged representation. Thus, if the fiscal year of the counties is the relevant one for purposes of contract bar, CSEA's period of unchallenged representation expired on May 31, 1978 and challenges filed during May 1978 were timely. However, if the fiscal year of the State is the relevant one for purposes of contract bar, the agreement would be deemed to have expired on March 31, 1978, and CSEA's unchallenged representation status would have expired on August 31, 1977. Therefore, a petition would have had to be filed during the month of August 1977. Thereafter, it would be subject to a subsequent bar.

The Director of Public Employment Practices and Representation concluded that CSEA's unchallenged representation status is determined by the fiscal year of the counties because it is they, and not the State, who negotiated the agreements and because they were the employers at the beginning of the contract periods. CSEA has filed exceptions to his decision. It contends that the relevant fiscal year is that of the State because it is the employer which must negotiate a successor agreement.

Discussion

There is some logic to support the CSEA contention. The reason that the Taylor Law authorizes a challenge seven months before the end of a public employer's fiscal year is to permit the resolution of representation disputes early enough so that the public employer and the certified employee organization can complete negotiations for a successor agreement before the public employer must adopt a new budget.¹ Here, the successor agreements must be negotiated by the State.

Notwithstanding the appeal of this argument, we find the arguments for relating a petitioning challenge to the fiscal year of the counties more persuasive. The policy underlying the Taylor Law is the promotion of harmonious relationships between governments and their employees. An essential ingredient of such relationships is stability. Stability, however, must be balanced against the right of public employees to change representatives at appropriate times. The language of Chapter 966 of the Laws of 1976 indicates that the Legislature was particularly concerned with maintaining terms and conditions of employment of court employees and the structure of their negotiations as they

¹ See the Report of the Governor's Committee on Public Employee Relations, March 31, 1966, pages 32 and 33.

existed at that time. Judicial Law §220.6(a) provides that, notwithstanding the change of employers, "terms and conditions of employment shall continue in effect until altered by state law or by the terms of a successor contract." Subdivision 7 of that section even restricts changes in negotiating units of court employees. The terms and conditions of employment have not been altered by state law.

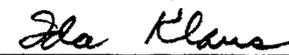
Despite these indications that the Legislature intended to maintain the status quo ante regarding the terms and conditions of employment of court employees during the period following the State's assumption of responsibility, we are asked by CSEA to interpret the law as intending to disrupt the existing labor relationship by shortening the period of unchallenged representation by nine months. We do not find such an interpretation consistent with the intent of the Legislature, as manifested by the language of the applicable statute. Moreover, in this unusual situation where a government with one fiscal year becomes the successor public employer to a government with a different fiscal year, it is more reasonable to interpret §208.2 of the Taylor Law as applying to the fiscal year of that government which was the public employer when the agreement became effective. We believe that Judicial Law §220.6(a) was intended to be construed in this way.

ACCORDINGLY, WE DISMISS the exceptions of CSEA, and

WE AFFIRM the determinations and orders of the Director in
both cases.

DATED: New York, New York
November 9, 1978


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

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